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No. 95-253

Supreme Court, U.S.
FILED
OCT 2 1995
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

EDWARD H. KOCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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We explain in our petition for a writ of certiorari that the question presented in this case—whether a federal land patent that conveys riparian land also grants title to unsurveyed islands in the adjacent stream—presents an important issue of federal law that has generated a serious and irreconcilable conflict among the courts of appeals. Respondents' arguments to the contrary are unpersuasive.

1. Respondents, who contend that this case simply involves title to some "insignificant land masses" (Br. in Opp. I), ignore the nationwide significance of the legal question at issue. Congress has plenary authority to dispose of the public lands. See Pet. 3-6, 22-23. The United States has asked this Court to resolve a

legal question of national importance respecting Congress's exercise of that power. We submit that Congress has not authorized the implicit conveyance of unsurveyed public lands to riparian owners free of charge. The six islands at issue here, which range in size from 7 to 67 acres and contain valuable minerals, are by no means "insignificant." See Pet. 7-9. But more important, those islands, which are found in a mere 15-mile reach of a single river, represent only a handful of the thousands of unsurveyed islands that are currently subject, as a consequence of the court of appeals' decision, to an uncertain ownership status. See Pet. 12-13.[1]

2. The case warrants review now because the courts of appeals have adopted contradictory rules governing conveyance of unsurveyed islands. Respondents are wrong in contending otherwise. See Br. in Opp. 5-7, 8, 16. The court of appeals in this case expressly acknowledged that the federal circuits are divided on the question. See Pet. App. 10a-11a & n.6, 13a. Indeed, as we explain in our petition, the courts of appeals have fallen into complete disarray

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[1] Respondents question whether the lands at issue here are actually islands, stating that the administrative law judge made a finding that "the land masses were not islands at the time the original surveys were conducted." Br. in Opp. 3; see Pet. App. 36a-37a. The Interior Board of Land Appeals (IBLA), however, carefully examined that issue and overruled the administrative law judge's finding, *id.* at 59a-65a, and the courts below both accepted the IBLA's ruling, see *id.* at 4a, 74a. Thus, the status of those land masses as islands is beyond question. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task").

respecting the status of unsurveyed islands. See Pet. 13-21.

Respondents' attempts to diminish the conflict are unavailing. For example, they contend that the Seventh Circuit's ruling in *United States* v. *Severson*, 447 F.2d 631 (1971), cert. denied, 404 U.S. 1039 (1972), which upheld the United States' ownership of two islands, turned on the dimensions of the disputed lands, which were approximately 20 and 255 acres in size. Br. in Opp. 16. To the contrary, the Seventh Circuit concluded that the United States retained ownership of the disputed lands because "the unsurveyed islands, existing at the time of statehood, remained the property of the United States," and "Wisconsin law could not and the patents did not convey to the patentees the unsurveyed islands." 447 F.2d at 635; see Pet. 17. In any event, the conflict among the cases cannot be reconciled by distinctions based on the size of the islands. The Ninth Circuit has upheld government ownership in a case involving much smaller islands, which ranged in size from .84 to 8.99 acres. See *Ritter* v. *Morton*, 513 F.2d 942, 944, cert. denied, 423 U.S. 947 (1975); Pet. 17-18; see also *Mission Rock Co.* v. *United States*, 109 F. 763, 769-770 (9th Cir. 1901) (upholding federal ownership of two islands that were respectively .01 and .14 acres in size), aff'd, 189 U.S. 391 (1903).[2]

Respondents also contend that the conflicting cases can be distinguished based on whether the surround-

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[2] As we explain in the petition, although the Ninth Circuit's *Ritter* decision is ultimately correct, it rests on a misunderstanding of this Court's precedents. See Pet. 18 n.9. Hence, that decision contributes somewhat to the current disarray in the courts of appeals.

ing waters are navigable or non-navigable. See Br. in Opp. 18 & n.18. The Court of Claims had suggested such a distinction, see *Bourgeois* v. *United States*, 545 F.2d 727, 730-731 (1976), but the Sixth Circuit has expressly disavowed that rationale, see *Wolff* v. *United States*, 967 F.2d 222, 226 n.3 (1992). See Pet. 19-21. Contrary to respondents' contention, a distinction based on the navigability of the surrounding waters cannot reconcile the case law. Indeed, that rationale would also conflict with state supreme court decisions that have recognized that the United States retains unsurveyed islands whether or not the surrounding waters are navigable. See *Bode* v. *Rollwitz*, 199 P. 688, 690-691, 692-693 (Mont. 1921); *Steinbuchel* v. *Lane*, 51 P. 886, 887-888 (Kan. 1898).

3. Respondents' arguments in support of the court of appeals' decision demonstrate precisely why the Court should review this case. This Court has made clear that Congress requires upland to be surveyed prior to disposition and that the United States therefore retains ownership of unsurveyed islands. See Pet. 17-29; see also, *e.g.*, *Moss* v. *Ramey*, 239 U.S. 538 (1916); *Scott* v. *Lattig*, 227 U.S. 229 (1913); *Buxton* v. *Traver*, 130 U.S. 232, 235 (1889). Those principles are longstanding and widely acknowledged. See, *e.g.*, *Severson*, 447 F.2d at 635; *Bode*, 199 P. at 692-693; *R.A. Mikelson*, 26 I.B.L.A. 1 (1976); *Emma S. Peterson*, 39 Pub. Lands Dec. 566 (1911); BLM, *Manual of Surveying Instructions* § 3-122 (1973). Nevertheless, as a result of the arguments put forward by respondents and accepted by the court of appeals, the law has now become uncertain and confused.

Respondents rely on cases, such as *Grand Rapids & I.R.R.* v. *Butler*, 159 U.S. 87 (1895), that this Court specifically distinguished in *Scott* v. *Lattig*, 227 U.S. at 244. Compare Pet. 14-16 with Br. in Opp. 9. They also conflate the principles that apply to uplands with those that apply to submerged lands. Compare Pet. 28 (quoting this Court's admonition that the rules applicable to submerged lands are not applicable to "islands or fast lands" (*Texas* v. *Louisiana*, 410 U.S. 702, 713 (1973)) with Br. in Opp. 2 (stating that "[t]his case concerns title to the bed of a non-navigable river"). Furthermore, respondents would subordinate the intent of Congress, which has plenary power over the disposition of public lands, see *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 47-54 (1983), to dubious inferences respecting the subjective beliefs of the Department employees who surveyed the lands and prepared the patents. Compare Pet. 22-27 with Br. in Opp. 21-23. Finally, respondents' contention that they acquired title to the islands, even though they regard the United States' intent on that point here as "ambiguous" (Br. in Opp. 23), cannot be reconciled with "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Western Nuclear*, 462 U.S. at 59.

This case presents the appropriate opportunity to clarify the controlling principles in this area of public land law, where clear and certain rules are essential to efficient government and to the protection of property rights and settled expectations.

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1995